In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No......

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State in said Action (the Supreme Court of Ohio refusing to certify the Record), and

BRIEF IN SUPPORT THEREOF.

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To the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State in said Action (the Supreme Court of Ohio refusing to certify the Record).

To: THE HON. CHARLES EVANS HUGHES, *Chief Justice*, and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State passing upon the questions involved in the above entitled action since the Supreme Court of Ohio under Constitutional right (Ohio Constitution, Sees. 2 and 4 of Art. 4) in its discretion refused to certify for review the said record of said Court of Appeals, Seventh Judicial District of Ohio, Lake County. (Record, page 358.)

Your petitioner, The Fairport, Painesville & Eastern Railroad Company, respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Action in an Ohio Court for personal injury to the driver of an automobile struck by a train at a highway crossing, to recover damages sustained by the collision, based in part upon a violation of Federal Safety Appliance Act, U. S. Statutes, Title 45, Chapter 1, and an order of the Interstate Commerce Commission June 6th, 1910, requiring that any train operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(a) The case was tried in the lower State Court at the September 1931 Term thereof, and resulted in a verdict by a jury and a judgment in favor of the respondent (plaintiff). (Record, page 3-4-5.) Petitioner (defendant) appealed to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, whose judgment was in favor of respondent (plaintiff). (Record, page 47..) Petitioner (defendant) applied to the State Supreme Court for an Order to Certify the Record of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, for review, which review was denied. (Record, page 58..)

(b) By the decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in its application of said Safety Appliance Act and the rule of the Interstate Commerce Commission thereunder, to a driver of an automobile on a highway, made the defendant (petitioner) guilty

of negligence *per se* and deprived your petitioner of the defense of "contributory negligence," contrary to law.

(c) The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, misapplied the Federal Safety Appliance Act as amended and the order of the Interstate Commerce Commission thereunder, to the benefit of a person on the highway, when by its terms it was enacted solely for the benefit of employes and passengers on trains.

(d) The question involved is one of great general interest and no Federal Court case has been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself.

JURISDICTION.

The Statutory provision which is believed to sustain the jurisdiction of this Court, is Sub-Section (b) of Section 344, U. S. C. A. (Judicial Code 237), an excerpt from that Section being:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States. * * *"

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Court of Appeals, Seventh Judicial

District of Ohio, Lake County, had in the case numbered and titled on its docket: "The Fairport, Painesville & Eastern Railroad Company, Plaintiff in Error vs. Mayme F. Meredith, Defendant in error," No. 227.

A certified copy of the record and the opinion of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, will be found on pages 348 to 357 of the Record, and are tendered herewith as a part of this petition.

Respectfully submitted,

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

ALVORD, BLAKELY & OSTRANDER,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

THOMAS M. KIRBY, being first duly sworn, says that he is one of the attorneys for the petitioner, THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, a corporation, and makes this verification duly authorized in the premises for and in its behalf; that he has read the foregoing petition and that the allegations therein contained are true as he verily believes.

THOMAS M. KIRBY.

SWORN TO BEFORE ME and subscribed in my presence this 7th day of February, 1934.

CARRIE E. JACOB,

(Seal) *Notary Public.*

(Carrie E. Jacob
Notary Public
My Commission Expires Dec. 14, 1936.)

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States of America; that I have prepared and examined the foregoing petition and that in my opinion the petition is well-founded and the case is one in which the prayer of the petitioner should be granted by this Court.

THOMAS M. KIRBY.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. .....

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion in the Court of Appeals, Seventh Judicial District of Ohio, Lake County, was not reported, but a certified copy appears in the Record at pages 34? to 35?.

The question is: Does the Safety Appliance Act and orders issued thereunder by the Interstate Commerce Commission, impose a duty upon a railroad to travelers in automobiles on the public highways?

ARGUMENT.

I.

STATEMENT OF CASE.

The defendant below (petitioner), is a short-line switching railroad, and on the morning of the 19th of July, 1929, had started a train from what is known as the "New York Central interchange" en route to the Village of Fairport two miles distant. About one and one-half miles from the interchange the railroad crosses a public highway at

grade and at that point said train came into collision with an automobile which the plaintiff (respondent) was driving, resulting in serious injuries to her person. The usual allegations of negligence in such cases were made against the defendant company (petitioner), and in addition thereto, namely, in the sixth paragraph of the assignments of negligence, it was averred as a specification of negligence, that:

> "In failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8...)

The Trial Court based a charge upon that averment to the effect that a violation of the Safety Appliance Act was negligence *per se*, and, if a proximate cause of the accident, would entitle the plaintiff (respondent) to recover. (Record, page 35-6)

The trial resulted in a verdict in favor of the plaintiff below (respondent). Judgment was duly entered, from which judgment error proceedings were prosecuted to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, and the judgment of the lower Court was affirmed. (Record, page 54..) All rulings anent the Safety Appliance Act and orders thereunder, were duly excepted to by the petitioner throughout the trial and in the Court of Appeals. An Application for an Order to Certify the Record to the Supreme Court of Ohio was duly filed and denied under the discretionary authority vested in said Court by Sections 2 and 4 of Article IV of the Constitution of the State of Ohio. (Record, page 55.)

II.

ASSIGNMENTS OF ERROR.

(a) The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, was erroneous in affirming the judgment of the lower Court wherein that Court held that the Safety Appliance Act, U. S. Statutes, Title 45, Chapter 1, and the order of the Interstate Commerce Commission of June 6th, 1910, inured to the benefit of the plaintiff below (respondent) while driving her automobile upon a highway over the crossing of the defendant (petitioner).

(b) The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred in holding:

> "The defendant violated a Federal law enacted for the protection not only of railroad employes and passengers on railroad trains but the *public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Record, page 356.) (Italics ours.)

(c) The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred in sustaining the judgment of the lower Court.

III.

JURISDICTION.

The judgment to be reviewed is that of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, rendered February 19th, 1934 (Record, page 347.), and this for the reason that a Motion to Certify the Record to the Supreme Court of Ohio was denied on November 29th, 1933. (Record, page 357.)

By virtue of Sections 2 and 4 of Article IV of the Constitution of Ohio, the right to review a judgment of an intermediate tribunal is discretionary.

"When by the constitution of a State the jurisdiction of its highest court to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal."

"The limit of time for applying here for certiorari dates from the refusal of the highest state court to review the decision of the intermediate court."

American Railway Express Co. vs. Levee, 263 U. S. 19.

The Federal Statutory provision which is believed to sustain the jurisdiction of this Court, is Sub-section (b) of Section 344, U. S. C. A. (Judicial Code, 237), reading in part as follows:

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty *or statute* of, or commission held or authority exercised under, the United States; * * *;" (Italics ours.)

The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in our opinion, entitles the petitioner to a writ of certiorari, for by the decision of that Court the Federal Safety Appliance Act, as amended, and the order issued by the Interstate Commerce Commission of June 6th, 1910, was permitted to inure to the benefit of one not included within the Act or order, namely, a traveler on the highway.

The sole question is:

Does the Safety Appliance Act and orders made thereunder impose a duty upon the railroad to persons other than employes and passengers on trains?

The plaintiff's (respondent's) petition, in the Sixth Specification of Negligence, as well as in the charging language of the body of the petition, alleged as a basis for recovery against the petitioner, as follows:

> "In failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8....)

In charging upon this portion of the averments of the petition, the Trial Court made the requirements of the Safety Appliance Act, as amended, and the order issued by the Interstate Commerce Commission thereunder, applicable to a person, who was neither an employe of defendant (petitioner) nor a passenger on said train, but the driver of an automobile upon a public highway which crossed the tracks of the railroad company.

And again in the course of the charge (Record, page 335-336), the Court said in its instruction to the jury as to what should be considered negligence upon the part of the defendant (petitioner) upon which the plaintiff (respondent) could recover:

> "The laws of the United States require a train so proceeding and having the legal status that this train had, to have at least 85% of the cars on such train equipped with air brakes so that by the use of air as applied through its brakes in addition to the air-brake on the engine, the train can be controlled by the engineer. It became, therefore, the duty of the defendant company in this case in starting this train of cars out, to provide that the air-brakes on at least 85% of those cars should be in working order so that they could be controlled from the engine, and in addition to the air-brake on the engine and tender itself; and the failure of the railroad company so to provide the equipment in the manner in which it should be used to control,

stop or check the progress of the train, would, in the eyes of the law, be negligence and for the direct and proximate consequence of such negligence, defendant would be liable." (Record, page 335-336

The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in affirming the trial Court's interpretation of the Safety Appliance Act, is erroneous and violative of the Federal Law.

In the course of its opinion the Court of Appeals, Seventh Judicial District of Ohio, Lake County, said (Record, page ...): 356-357

> "We do have a direct violation of a Federal Statute under which the defendant was required before leaving the interchange, to connect at least 85% of the cars in the train for air, and because of that mandatory duty, it must be conclusively presumed to have anticipated all consequences of its negligence, which responsibility continued present during all the time it operated its train in this defective condition. * * * The defendant violated a Federal law enacted for the protection not only of railroad employes and passengers on railroad trains *but the public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Italics ours.)

We submit, therefore, that such decision is one which this Court has the right to, and should, review, since by its affirmance of the decision of the lower Court in relation to the averments of the petition and the charge of the Court, this is a case reviewable under Subsection (b) of Section 344 of U. S. C. A., *supra*.

No cases in the Courts of the United States have been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself.

The preamble to the Act reads:

> "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive-wheel brakes, and for other purposes."

We find nothing in the preamble or the text of the Federal Safety Appliance Act, as amended, or in the order of the Interstate Commerce Commission of June 6th, 1910, where the provisions of that Act or order have been applied for the benefit of a traveler on the highway. The original Safety Appliance Act relative to air brakes required 50% of successive usability, while the order of the Interstate Commerce Commission of June 6th, 1910, raised that percentage to 85%.

SUMMARY.

(a) That this is a cause where a title, right, privilege or immunity is specially set up or claimed by either party under a statute of the United States and is one which is competent for the Supreme Court, by certiorari, to review and determine;

(b) That it is one wherein a Statute of the United States is asserted and wrongfully applied;

(c) That the Federal Safety Appliance Act and the rule of the Interstate Commerce Commission under date of June 6th, 1910, have no application, and the finding of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, to the contrary, is erroneous and violative of the terms of the Federal Act and the order thereunder, and wrongfully construes the same as negligence *per se* with the deprivation to the defendant below (petitioner) to the benefit of the doctrine of "contributory negligence";

(d) That this decision, being a decision of the intermediate Court, and the Ohio Constitution providing for discretionary jurisdiction to review a judgment of such intermediate tribunal, and the review being declined, this Court has the right to issue a writ of certiorari addressed to the said intermediate tribunal;

(e) That no Federal decision has been rendered where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself;

(f) Neither the Safety Appliance Act nor the order thereunder, applies to one other than an employe or passenger.

CONCLUSION.

The importance of a decision of this Court upon the question "Does the Safety Appliance Act and orders made thereunder, impose a duty upon railroads to others than employes and passengers on trains?" is obvious, and we submit that your petitioner is entitled to an issuance of a writ of certiorari for a review of the decision of the Court below.

The question presented by the record of the Court below is one of great and general public interest, and in our opinion, should be settled by this Honorable Court.

Respectfully submitted,

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THOMAS M. KIRBY,
Attorneys for the Petitioner.

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